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In the Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The California Court of Appeal

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 103 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in every major facet of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 850 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

As part of the regular product-design process, PLAC's corporate members must routinely analyze and resolve questions about safety. PLAC members who manufacture products with the potential to cause serious physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles—have a particular interest in the legal ramifications of product-design decisions.

By imposing punitive liability against a manufacturer without requiring any assessment of whether its conduct was objectively reasonable, the California courts have embraced a regime of *post hoc* second guessing that would deprive any manufacturer of the ability to know in advance whether its decisions will subject it to punishment. Such an approach not only deprives manufacturers of "fair notice * * * of the conduct that will subject [them] to punishment" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996)) but also "'mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim'" (*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting))).

When punitive damages are imposed for objectively reasonable conduct, their assessment is divorced from their constitutionally-authorized purpose. It is particularly important to PLAC's members that the law provide clear guidance on how manufacturers can avoid the imposition of punitive liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a $55 million punitive damages award attributable to the design decisions of petitioner Ford Motor Company ("Ford"). Notwithstanding the magnitude of the award, when Ford made its design decisions, it had no reason to believe that those decisions would subject it to *any* liability whatever. Nonetheless, the California courts concluded that Ford could be mulcted for punitive damages without regard to whether its design decisions were objectively reasonable. The ramifications of this *post hoc* approach to the imposition of punitive damages are chilling.

The rationale underlying a punitive award presupposes that the defendant could have—and should have—conformed its conduct to society's expectations but strayed so far from its responsibilities that a sanction of a quasi-criminal magnitude is required. The imposition of punitive damages for objectively reasonable conduct unhinges punitive liability from these purposes and implicates the Constitution in two respects. *First*, it squarely breaches the due process imperative of fair notice. If a design decision may subject a manufacturer to punitive liability notwithstanding the existence of objective indicia that the design decision was reasonable, then the manufacturer could not have been on notice that it was committing sanctionable misconduct. *Second*, this approach runs afoul of the due process proscription against arbitrary punishments. Due process requires procedures to "cabin the jury's discretionary authority" (*Philip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007)) to impose liability for punitive damages every bit as much as it requires procedures to

limit the jury's discretion regarding the amount of punishment. When a jury imposes punitive damages for conduct that an objective observer could have deemed lawful, the result is arbitrariness—the proverbial bolt from the blue.

In the product liability context, the consequences of unpredictable and arbitrary punitive awards can be severe. Past punitive awards create powerful—if often irrational—incentives for manufacturers attempting to design products in similar situations. Safety-related decisions should be made on the merits of competing designs and not the fear that juries will, out of sympathy for a badly injured plaintiff or misplaced anger against a large corporation, levy massive punitive exactions without regard to whether the manufacturer had an objectively reasonable basis for its design decision. To avoid the deleterious consequences of overdeterrence and ensure that manufacturers are afforded their due process rights to fair notice and protection against arbitrary deprivations of property, this Court should grant review and hold that punitive damages cannot be imposed upon a manufacturer whose design decision was objectively reasonable.

A. The Product-Design Process Necessarily Requires Manufacturers To Make Complex Cost-Benefit Decisions About Proposed Design Features.

No product is completely safe. Nor does tort law require manufacturers to build the safest product that money can buy. Thus, airplanes are not constructed entirely from the materials that comprise the indestructible "black box," subway trains are designed to permit standees when sitting might be safer, and automobiles are not equipped with a NAS-

CAR-style roll cage. The process of product design necessarily involves complex cost-benefit decisions. When contemplating a particular design feature, a manufacturer must consider many factors: the risks that are present in the design (including their likelihood and severity), the risks present in alternative designs, and the relative costs and benefits of the feature with respect to other design considerations such as performance, efficiency, marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and costs to consumers. The task of a responsible manufacturer is to strike a reasonable balance between these often countervailing interests.

Of course, the result of this complex cost-benefit analysis can be affected by externalities. Sometimes, statutory and regulatory requirements—developed in daylight with public input and debate—can alter a manufacturer's independent judgment.

Similarly, the threat of punitive damages can skew the design judgments of even the most conscientious manufacturers. Put simply, when punitive damages are awarded for a defective product design, they have the purpose and effect of deterring other manufacturers from making similar design decisions. This may be appropriate in some circumstances, but when manufacturers are left to guess what decisions may be subjected to quasi-criminal condemnation and sanctions, the result is a scattershot of design deviations based on no effective policy foundation.

B. The Imposition Of Punitive Liability In This Case Will Have An Irrational And Dangerous Impact On The Product-Design Process.

In this case, there was no way for Ford to know that it risked punitive liability when it made its design decisions. It complied with the standard on roof strength (FMVSS 216, 49 C.F.R. § 571.216) set by the National Highway Traffic Safety Administration ("NHTSA"), whose experts believed that vehicles with roofs designed to meet the standard were reasonably safe. Likewise, NHTSA considered and *rejected* the roll-over stability standards relied upon by plaintiffs' experts after the fact. Pet. 4.

When the Explorer was designed, Ford's engineers faced an inevitable dilemma in determining the center of gravity: A high center of gravity increases the risk of injuries caused by rollovers, while a low center of gravity increases the risks of injuries from head-on collisions. See, *e.g.*, Ford's Ct. App. Br. 47–48. Likewise, experts disagreed about how to measure vehicle stability. *Id.* at 47–49. The existence of these genuine ongoing disputes among experts over the merits of the disputed "safety features" colors the nature of Ford's design decision in this case. Ford had to analyze competing expert opinions on the fundamental safety-related merits of various design features. There was no consensus about whether certain alternatives created an unreasonable risk. Indeed, with respect to the Explorer's center of gravity, there was no consensus about how to balance the tradeoff between rollover risk (with its high severity but low probability) and head-on risk (with relatively lower severity but higher probability) in crafting a safe vehicle overall. Ford's ultimate de-

cision was based on its attempt to strike a reasonable balance between all of the diverse factors discussed above. In other words, the design decision involved in this case was not simply a question of dollars and cents versus safety but involved a fundamental controversy about the relative safety of different product designs.

We take no position on the merits of these competing viewpoints or whether Ford's ultimate decision was correct in hindsight. Those are questions that are appropriately resolved by a factfinder when deciding whether to award *compensatory* damages. Nor do we take a position on the more complicated question of when a design decision that straightforwardly chooses costs over known safety risks should give rise to punitive liability. Instead, our point is that, contrary to plaintiffs' theory of the case, punitive liability is never appropriate when, at the time that design decisions were being made, there was an objectively reasonable basis for making the decision—and no reason to believe that it would be subjected to punitive sanctions.

C. This Court Should Grant Review To Confirm That The Due Process Clause Prohibits States From Imposing Punitive Damages On A Product Manufacturer For Conduct That Reasonable Persons Could Have Concluded Was Lawful.

This Court repeatedly has stated that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose'" and "threaten 'arbitrary punishments,' *i.e.*,

punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Philip Morris*, 549 U.S. at 352. Accordingly, "this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Id.* at 353. By the same logic, a State that fails to cabin the jury's discretion deprives a defendant of fair notice of the conduct that will expose the defendant to punitive liability in the first place.

Both the requirement of "fair notice" and the limitation on "arbitrary punishments" are implicated when California courts sustain punitive liability without regard to whether the defendant had an objectively reasonable basis for believing that its conduct was permissible.

1. "[T]he concept of fair notice is [the] bedrock of any * * * procedure." *Lankford* v. *Idaho*, 500 U.S. 110, 120–121 (1991). As this Court has explained, "the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted). It follows inexorably that an unpredictable sanction does not permit a party to order its behavior and therefore violates due process. Accordingly, "[e]lementary notions of fairness enshrined in [this Court's] jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *BMW*, 517 U.S. at 574; see also *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402–403 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits").

Punitive damages can violate this principle in two ways. A statute that is vague on its face makes it impossible for *any* defendant to predict what conduct will be penalized. Alternatively, the circumstances of a particular case can render punitive damages unpredictable such that the governing statute is vague as applied. Both concerns are particularly potent in the product-liability context. Tort law expects manufacturers to make risk-utility assessments of design proposals. If they cannot adequately anticipate the risk of punitive damages, however, those calculations will be less likely to maximize either utility or public safety.

As one commentator has observed, in the product-liability context an award of punitive damages can give rise to "'indirect' costs that manufacturers appear to take very seriously, such as publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000); see also *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards."); *Masaki* v. *Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed").

Sensitive to these concerns, several courts have held as a matter of state law that punitive liability is inappropriate when the manufacturer has made a design decision that was supported by contemporaneous expert opinion—such that an objective observer could have concluded that the decision was reasonable—even though other experts might have believed that the design created an unreasonable risk of injury.[2]

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[2] See, *e.g.*, *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke* v. *Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); *Loitz* v. *Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (reversing punitive award in part because there was a good-faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Mercer* v. *Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational jury could not find defendant liable for punitive damages even though it could reasonably find liability on plaintiffs' underlying tort claims); *Hillrichs* v. *Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp.* v. *Garrett*, 682 A.2d 1143, 1163–1165, 1167–1168 (Md. 1996) (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); see generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 38 (1982).

Likewise, in equivalent contexts, this Court has recognized that due process precludes the imposition of punishment whenever the defendant reasonably could have concluded that its conduct was lawful. *See generally Colautti* v. *Franklin*, 439 U.S. 379, 401 (1979) (finding criminal statute predicating liability on a "complex medical judgment about which experts can—and do—disagree" to be unconstitutionally vague); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 392 (1926) (criminal law "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another"); *Sw. Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490 (1915). Nevertheless, the court below specifically refused to consider whether punitive liability could coexist with the objectively reasonable belief that the design decision was correct.

This case accordingly exemplifies the need for this Court to clarify that the fair notice component of due process—not just state law—precludes imposition of punitive damages when the record contains objective indicia of the reasonableness of the defendant's conduct.

2. This Court's oft-expressed concern about arbitrary punishments further supports the need for review. For a variety of reasons, product liability cases pose significant and persistent risks that punitive damages will be imposed arbitrarily. *First*, such cases frequently involve catastrophic injury or death. *Second*, many products—no matter how well-designed—carry unavoidable risks. *Third*, the design process necessarily involves attempts to identify and balance risks. Thus, manufacturers are particularly susceptible to findings of punitive liability by

juries that are exhorted to conflate intent to design a product in a certain way with intent to injure.[3]

Serious injuries viewed through the lens of hindsight can result in serious penalties that have no power to deter future misconduct.

As Judge Easterbrook has explained:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *
>
> Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

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[3] Design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994); see also Owen, *supra* note 2, at 22–26.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 215–216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001).

The arbitrary nature of punitive damages in the product liability context is at its zenith when such damages are imposed in the face of objective evidence of the reasonableness of the design decision—such as evidence that the decision complied with NHTSA standards or evidence of a legitimate, good-faith dispute among experts over the best way to balance risk against functionality. If punitive damages are permitted in such circumstances, there is no way (other than building a fortress on wheels) for the manufacturer to protect itself from punitive damages. That is the height of arbitrariness. For this reason as well, review is warranted to make clear that the Due Process Clause prohibits the imposition of punitive damages when the defendant had an objective basis for believing its conduct to be permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Corporate Members of the Product Liability Advisory Council

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.

Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Rubbermaid Inc.
Nintendo of America, Inc.

Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Senco Products, Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.